

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION**

**MDL NO. 2406**

**Master File No. 2:13-CV-20000-RDP**

**This document relates to:  
Subscriber Track cases**

**SUBSCRIBER PLAINTIFFS' EXECUTIVE SUMMARY OF  
MERITS EXPERT REPORTS**

**Professor Christy Chapin**

1. **Professor Christy Chapin** (“Chapin”) is an associate professor in the history department at the University of Maryland Baltimore County (“UMBC”) where she is also affiliated with the School of Public Policy. She is a visiting scholar at the Robert H. Smith School of Business at the University of Maryland and a fellow at the Institute for Applied Economics, Global Health, and the Study of Business Enterprise at Johns Hopkins University. She received a doctorate degree in history at the University of Virginia and a B.A. in Government from William and Mary. At UMBC, she teaches courses in business, economic, and political history. She serves on the editorial boards of *Enterprise & Society* and the *Journal of Policy History*, both of which are peer-reviewed academic journals published by Cambridge University Press.

2. Chapin’s book, *Ensuring America’s Health: The Public Construction of the Corporate Health Care System*, published in 2015 by Cambridge University Press, examines how insurance companies developed over the twentieth century and into the twenty-first century to assume a central role in the United States health care system. The book includes in-depth case studies of three professional and trade associations: the American Medical Association, which represents physicians; the Health Insurance Association of America, which represents commercial or for-profit insurance companies; and the Blue Cross and Blue Shield Associations (“BCBSA”). The book won the Business History Conference’s annual prize for the best book exploring the theme of how business enterprise has shaped the economic conditions of a country. Chapin’s published articles and essays have covered a variety of topics, including the United States health care system, trade associations, and health insurance companies.

3. Chapin was asked by Subscriber Plaintiffs' counsel to determine to compare the ordinary custom and practice of trade associations in the United States with those of BCBSA. She concludes that BCBSA has acted in a manner inconsistent such customs and practices, for the following reasons.

4. *First*, unlike a typical trade association, BCBSA's membership is not open to all companies that are horizontal to one another within the industry's supply chain. *Second*, BCBSA exerts operational control over its Member Plans, requiring them to operate only in exclusive service areas ("ESAS") and placing revenue caps on non-branded business. *Third*, BCBSA requires Member Plans to provide detailed information concerning their financial and business operations for purposes of monitoring of compliance with those rules. *Fourth*, BCBSA punishes its Member Plans who fall out of compliance with those requirements. All of these actions are inconsistent with how a traditional U.S. trade association operates.

**Professor Ariel Pakes**

1. **Professor Ariel Pakes** ("Pakes") submitted an expert report on class certification on April 15, 2019 (and an amended report on April 26, 2019). The summary submitted with Pakes' class certification report (ECF No. 2411) is hereby incorporated by reference. His merits expert report contains substantially the same discussion with some additions. The principal difference between Pakes' class certification report and the present one is that in his prior report, he demonstrated the feasibility of his simulation model of damages, using data for 2010, and in his present report, he models damages for the entire Class Period.

**Louis T. Pirkey**

1. **Louis Pirkey** ("Pirkey") graduated from law school in 1964 and has practiced exclusively in the field of intellectual property law. For over 40 years, his practice has been

focused almost exclusively on trademark law. That practice includes all phases of trademark law but has been especially focused on litigation in the federal courts around the United States and the United States Patent and Trademark Office. He has handled multiple matters include 3M, ExxonMobil, University of Texas institutions, Shell Oil Company, The Pillsbury Company, Baylor University, Medtronic, Inc., HEB Grocery Company and T.G.I. Friday's. The cases he has handled for these companies, and many others, have involved many different issues of trademark law, including acquisition of rights and abandonment. During the course of Pirkey's career, he has successfully tried many trademark infringement cases, both to juries and in bench trials, as well as numerous preliminary injunction motions, which are common in trademark cases. His practice has also included counseling and opinions on trademark law issues. Pirkey has served as President of the American Intellectual Property Law Association.

2. Subscriber Plaintiffs' counsel asked Pirkey to opine on whether the facts of this case are consistent with abandonment of trademarks. He has extensively reviewed the record in this litigation relevant to this topic.

3. Based on that review, Pirkey opines that the Minnesota Plan, which owned common law rights in the Blue Cross Marks, allowed use of those marks by other Plans without a license agreement and with no quality control of the other Plans for years after the first use of those marks. He further opines that that the Buffalo Plan, which owned common law rights in the Blue Shield Marks, allowed use of those marks by other Plans without a license agreement and with no quality control of the other Plans for years after the first use of those marks.

4. It is Pirkey's opinion that the facts of this case are consistent with a finding that: (i) the Blue Cross Marks were abandoned prior to 1947 by naked licensing of the marks and (ii) the Blue Shield Marks were abandoned prior to 1949 by naked licensing of the marks.

**Professor Daniel Rubinfeld**

1. **Professor Daniel Rubinfeld** (“Rubinfeld”) submitted an expert report on class certification on April 15, 2019. The summary submitted with Rubinfeld’s class certification report (ECF No. 2411) is hereby incorporated by reference. His merits expert report contains substantially the same discussion with some additions. The principal differences between that report and the present one are that (a) the present report focuses on the merits of Subscriber Plaintiffs’ claims rather than on class certification and (b) includes additional discussion of the evidentiary record in this case, including materials recently produced from the *Anthem/Cigna* merger litigation.

**Leslie Strassberg**

1. **Leslie Strassberg** (“Strassberg”) is the Chief Financial Officer (“CFO”) of b.well Connected Health (“b.well”), a healthcare startup company that provides personal health management software tools to health insurance companies, health systems, and self-insured employers. In addition to its healthcare tools and services, b.well has also sought to offer insurance products in a number of states, and as its CFO, Strassberg has been responsible for identifying those opportunities and developing business plans to establish insurance operations. Between July of 1984 and July of 1989, he was Vice President for Underwriting and Administration at Empire Blue Cross Blue Shield (“EBCBS”). While at EBCBS, he served on a team that developed and implemented an expansion plan into Orange County of New York. Strassberg previously submitted a declaration in connection with the parties’ summary judgment briefing on application of a *per se* standard.

2. Strassberg has been asked by Subscriber Plaintiffs’ counsel to opine on the attractiveness of the Alabama commercial insurance market for entry by another Blue Plan

(either on a Blue or Green basis) in 2005 and throughout the Class Period (April 17, 2008 to December 31, 2013) for the proposed Alabama Damages Class. He has reviewed both publicly available documents and documents produced in this litigation in reaching his conclusions.

Strassberg finds that the market for health insurance in the state of Alabama is an attractive one for entry by a Blue or Green competitor and was also attractive for entry in 2005 and during the Class Period. Strassberg further finds that Blue Cross Blue Shield of Alabama (“BCBSAL”) is the dominant health insurance company in Alabama, because it not only maintains a dominant share of the market, but it also currently faces little competition. Generally speaking, market participants view this lack of competition as likely to breed complacency, inefficiency, and an absence of innovation.

3. Strassberg finds that BCBSAL accumulated over **\$1.1 billion in surplus** over the Class Period. Strassberg finds BCBSAL earned substantial profits over the last 17 years, also making Alabama an attractive candidate for a new market entrant.

4. Strassberg also notes that BCBSAL excessively compensates its executives, such that even as a “non-profit”, BCBSAL’s executives are compensated more than their counterparts at for-profit insurers. He also finds that BCBSAL executives’ explosive compensation growth (150% between 2008 and 2015) is not justified by growth, as during that same period, BCBS-AL had the slowest revenue growth of its comparable peer companies.

5. Strassberg further finds that neighboring Blues would be well positioned to enter Alabama and offer health insurance to subscribers, whether as a Blue or a Green.

This the 15<sup>th</sup> day of May, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2019, the foregoing was served on all counsel of record via CM/ECF.

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